No. 80672-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LARRY NELSON, and the marital community composed of LARRY and BARBARA NELSON

Respondents,

v.

WESTPORT SHIPYARD, INC., a Washington corporation, J. ORIN EDSON, individually and his marital community composed of ORIN and CHARLENE EDSON; DARYL WAKEFIELD, individually, and his marital community composed of DARYL and KIM WAKEFIELD

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

The Court of Appeals was correct to affirm the trial court's decision rejecting Westport's demand for arbitration. Although this substantive decision was correct, the Court of Appeals should not have even considered Westport's appeal on the merits.

Westport waived any claim of arbitration by failing to file a notice of appeal until after seeking and obtaining a ruling from the court on the enforceability of the shareholder agreement, which is the same issue Westport asserts is subject to arbitration. This Court should adopt a bright line rule that a party who seeks arbitration cannot also move and receive a decision on the merits from the court without waiving the right to arbitrate that issue. *See e.g., Baker v. Stevens*, 114 P.3d 580 (Utah 2005). To hold otherwise would give a party two bites at the apple. The party claiming arbitrability could first try its luck in a judicial forum and if the results are not as desired, then it could seek to compel arbitration. This is not proper. A party has a duty to resolve the question of arbitration, prior to litigating the underlying claims before the court.

On the merits of this appeal, even if the shareholders agreement is enforceable, it is narrow in scope. It does not address or control Larry Nelson's rights under Washington's Law Against Discrimination ("WLAD"), his right to a jury trial on his employment claims and his minority shareholder common law causes of action, or his issues

challenging the enforceability of that agreement. Under the specific and narrow language in the shareholders' agreement, an arbitrator is not given authority to determine these questions. It is apparent that Westport would desire to have the underlying factual issues supporting these claims to be determined in arbitration, and not before a jury; and then it would attempt to assert collateral estoppel, which this Court should not allow. Even if valid, the shareholders' agreement merely addresses the methodology and formula for valuation of shares when a legitimate buy-back is required. As the courts below both recognized, the shareholders' agreement does not cover, touch, or concern Mr. Nelson's employment relationship or the duties owed to him as a minority shareholder.

In contrast to this case, the all-disputes clause found in *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 442-445 (2006) specifically gave the arbitrator the authority to decide all disputes related to "the validity, enforceability, or scope of the agreement." (Emphasis added.) Although Westport argues that an arbitrator always decides the enforceability of a contract with an arbitration clause, this is clearly not correct. Under Westport's theory, an arbitrator would decide the enforceability of an agreement even if the document expressly provided that an arbitrator is not to decide its enforceability. The underlying contract language controls, and as the trial court and the Court of Appeals

both held, the specific agreement in this case does not give the arbitrator authority to determine the enforceability of this shareholders' agreement.

II. STATEMENT OF ISSUES

1. Whether the Court of Appeals erred in considering the question of arbitration when Westport only sought appellate review after receiving adverse rulings on substantive motions for summary judgment, including the very issue allegedly subject to arbitration?

2. Whether the Court of Appeals was correct in holding that under the arbitration provision here, the trial court is to decide the enforceability of the shareholders' agreement when that provision is narrow, only relates to the share value if a legitimate buy-back is triggered, and does not address Mr. Nelson's employment relationship or the duties owed to him as a minority shareholder?

III. STATEMENT OF THE CASE

A. Factual Background.

Westport Shipyard, Inc., was started by Rick and Randy Rust in 1978 and has been in the business of manufacturing boats ever since. CP 110. In 1983, Larry Nelson began working for Westport as a laborer on the laminator line. He stayed with Westport for his career, eventually earning a position as a key executive. CP 109. Several times, Mr. Nelson contemplated leaving for other valuable opportunities, but he was promised an ownership opportunity and just cause employment. CP 18. Based on these and other representations, Mr. Nelson stayed with

Westport, purchased shares and became the Vice President and Chairman of the Board of this closely held, valuable company. CP 18, 19, 110.

In 1996, the Rust brothers sold shares to Orin Edson making Mr. Edson a one-third owner. CP 18. From that point on, Mr. Edson gradually exerted control over the other shareholders. CP 19, 111-113. He acted in a domineering and draconian way to employees and minority shareholders. *Id.* He routinely threatened termination of employment and often fired individuals in a vengeful and arbitrary fashion. *Id.* It was in this same atmosphere that Mr. Edson mandated the shareholders sign the 2004 Shareholders' Agreement to accomplish a sale of shares to his friend Daryl Wakefield. CP 19, 111-112. Around this time, after years of difficulties, the last Rust brother sold Mr. Edson his interest. CP 19.

Although Mr. Edson became the majority shareholder, Mr. Nelson had always planned and intended to continue with Westport. CP 20. Earlier, Mr. Edson represented to Mr. Nelson that he could work until retirement, that they would grow the company as partners, and that his ownership would be worth more than book value. CP 331.

On April 29, 2005, during the middle of a business seminar, Mr. Nelson experienced a medical emergency and was transported to the hospital by ambulance. CP 20. Within a few days, for the first time, Mr. Edson approached Mr. Nelson about forced early retirement. *Id.* Two days later, Mr. Edson faxed Mr. Nelson a letter stating in relevant part that

it would be "best" if he "would retire" "considering [his] health problems," "some known, some unknown." *Id.* Shortly thereafter, Mr. Nelson advised Mr. Edson that he would continue to work full-time for Westport, not retire, and that he had no medical work restrictions. *Id.*

The next day, May 18, 2005, Mr. Nelson was informed in writing that his "presence is not required nor allowed at Westport Shipyard facilities." CP 20. He was told to leave the premises and that he had until June 16, 2005, to resign under defendant's terms or be fired. *Id.* On May 26, 2005, all Westport employees were informed that Mr. Nelson was no longer working at the company. *Id.*

On June 17, 2005, Mr. Nelson was notified that the Board of Directors had terminated his employment. CP 21. This board meeting was not properly noticed in violation of the corporation's by-laws. *Id.* Mr. Wakefield, now President of Westport, advised Mr. Nelson that due to his termination, Westport would be purchasing his shares pursuant to the 2004 Shareholders' Agreement, which provided that the buy-back price is to be 1.5 times the book value. CP 33. However, the amount offered to Mr. Nelson was based on an incorrect book value. CP 360-61.

The 2004 Shareholders' Agreement provides, in pertinent part, as follows:

. . . .

> 2.3.3 upon the irresolvable difference between shareholders (a majority vote of the shares owned by the then current

shareholders of record shall determine which shareholder shall be bought out); or

2.3.4 upon the termination/resignation of employment; death; or incapacity of any shareholder;

the Corporation shall have the option to purchase any or all of the shares held by the shareholder in the Corporation.

CP 45. It also provides that the corporation must pay 1.5 times the book value of the stock as determined in the last audited financial statement. CP 46. The three earlier buy-sell stock agreements have similar provisions, except the re-purchase price is book value. CP 56-66.

The 2004 Shareholders' Agreement contains a narrow arbitration clause as follows:

> 6.5 Arbitration. In the event of any disputes among any of the parties arising out of this Agreement, then such disputes shall be submitted to arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. . . .

CP 52.

B. Procedural Background.

Mr. Nelson filed suit on June 24, 2005. CP 1. An Amended Complaint was filed on July 15, 2005. CP 16. On August 5, 2005, Mr. Nelson filed a demand for jury trial pursuant to RCW 7.07.040, on the "validity or existence of the arbitration agreement of the 2004 Shareholders Agreement or the failure to comply therewith." CP 563. In his lawsuit, Mr. Nelson asserts causes of action for disability discrimination in violation of the WALD, breach of implied contract to terminate only for just cause, wrongful withholding of wages, breach of

fiduciary duty, minority shareholder oppression, and tortious interference with business expectancies. CP 23-28. He also seeks a declaratory judgment that the shareholders' agreement does not control or limit his claims or damages, and that it is unenforceable, based on misrepresentations, duress, coercion, failure of consideration and Westport's own breach. CP 23-27, 317.

On August 8, 2005, Westport moved to compel arbitration of all shareholder claims, attempting to include many of the shareholder-related factual disputes underlying the other causes of action. CP 30. The trial court refused to grant Westport's motion, stating:

> There is no indication that the parties agreed to arbitrate the type of claims set forth in the amended complaint. One cause of action challenges the validity of the Shareholders Agreement. I do not know if the claim has any merit, but I do conclude that such a claim is not covered by the arbitration clause in the Shareholder Agreement.

CP 132. The Order entered later on November 10, 2005, states that "it is hereby ordered that at this stage of the litigation, Defendants' Motion is denied." CP 134. On December 6, 2005, Westport filed a "motion for clarification." CP 141. Westport acknowledged it was a "second motion to compel." VRP (Jan. 3, 2006) 2:6. This motion was also denied. *Id.* at 8.

Westport elected not to appeal these orders denying arbitration as to enforceability of the agreement or its breach. Instead, it accepted the trial court's decision and began to ferociously litigate. It requested relief

from the trial court in the form of dispositive motions to dismiss claims, motions to compel discovery, commissions for out-of-state depositions, and even a motion for sanctions, which was denied. Significantly, on March 3, 2006, Westport filed a motion for partial summary judgment to dismiss the claim for punitive damages, CP 598-606, which was granted. CP 648. Even more significantly, on March 21, 2006, Westport filed a motion for partial summary judgment regarding the claim for declaratory relief. CP 235. In that motion, Westport sought a summary determination that the Shareholders' Agreement is valid and enforceable – the very claim Westport argues is subject to arbitration. CP 235.

After filing the motion for partial summary judgment on the claim for declaratory relief, Westport filed yet another motion to compel arbitration. CP 390. This motion, like the others, was denied. A memorandum opinion was issued July 21, 2006. CP 498. The trial court simply reiterated "[i]n the present case, I ruled that the arbitration clause is narrow, and the parties did not agree to arbitrate the validity of the Shareholders Agreement." *Id.* (emphasis added). Although Westport cited *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440 (2006), the Honorable F. Mark McCauley held that *Buckeye* was inapplicable because the parties' agreement in this case, unlike *Buckeye*, was narrow and it did not give the arbitrator the authority to determine the agreement's validity. *Id.* The trial court entered a third order again denying Westport's motion

to compel arbitration on August 10, 2006. CP 503. Westport then filed a notice of appeal on September 1, 2006. CP 506.

Mr. Nelson filed a motion to dismiss the appeal arguing that Westport waived its right to appeal because it waited until after the trial court denied its motion for summary judgment on the enforceability of the agreement. The Court of Appeals' Commissioner denied Mr. Nelson's motion, and the Court of Appeals affirmed on a motion to modify.

On August 7, 2007, the Court of Appeals issued its decision, holding that the 2004 Shareholders' Agreement did not encompass disputes about the validity, enforceability, or scope of the agreement, and that it did not cover disputes over fiduciary breach or minority shareholder oppression. *Nelson v. Westport*, 140 Wn. App. 102, 105, 163 P.3d 807 (2007). In reaching these holdings, the court observed that "whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties." *Id.* at 117. The matter was remanded for trial on the enforceability of the agreement and Mr. Nelson's employment and shareholder claims. The appellate court also held that if the agreement is held enforceable and there is a dispute over the buy-back value of the shares, then such value issue is to be determined through arbitration. *Id.* at 118-119. Mr. Nelson has always contended that if the agreement is held to be enforceable and if a buy-back is required, then the ultimate share value for that buy-back would be arbitrable.

Westport then filed a Petition for Review and Mr. Nelson included these procedural issues in his Answer to the Petition for Review. This Court accepted review of all issues.

IV. ARGUMENT

A. Standard of Review.

A decision as to whether a party waived the right to proceed with arbitration is reviewed de novo. *Steele v. Lundgren*, 85 Wn. App. 845, 850, 935 P.2d 671 (1997). The decision as to whether a specific dispute falls within the scope of an arbitration agreement is reviewed de novo. *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47 (1964).

B. Westport Waived its Right to Arbitration By Waiting Until the Trial Court Ruled on the Substantive Question at Issue.

The time for filing a notice of appeal is a jurisdictional step. *In re Yand's Estate*, 23 Wn.2d 831, 838, 162 P.2d 434 (1945). "[A]n appeal must be perfected in the manner and time required by the rule in the court where judgment or order from which appeal is taken is entered to give appellate court jurisdiction of the appeal for purpose other than dismissal of the appeal." *Id.* In stark contrast to most deadlines, the deadlines for filing an appeal are strictly construed. RAP 18.8. A trial court's decision refusing to compel arbitration and stay litigation is for immediate appeal. *Herzog v. Foster,* 56 Wn. App. 437, 445, 783 P.2d 1124 (1989).

RAP 2.2(a)(3), provides for an appeal of right from "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." In *Herzog*, the court held that when a trial court refuses to stay litigation pending arbitration, this decision "is appealable as of right under the language of RAP 2.2(a)(3)." *Id.* at 445. There, the court explained that, in part, the reasoning for the rule is that "[i]f a court refuses to stay litigation pending arbitration, the party seeking to enforce arbitration will suffer the serious, irreparable consequence of being forced to resolve the dispute by costly and lengthy litigation rather than by arbitration." *Id.* at 443. The notice of appeal must be filed within 30 days. RAP 5.2(a).

While one of the reasons for requiring an immediate appeal is to prevent the delays and costs of extended judicial proceedings from defeating the savings associated with arbitration, another equally important reason is that it prevents a party from first litigating their claims in court prior to a final decision on the question of arbitrability. If the party requesting arbitration is allowed to wait and appeal after the litigation is complete or partially complete, that party has essentially engaged in impermissible forum shopping – it would first see how the litigation unfolds before deciding whether an arbitral forum is what it really wants. Washington courts should not allow such tactics.

Here, Westport did not immediately appeal the trial court's rejection of the demand for arbitration, and instead, fully engaged in extensive discovery and substantive motion practice. CP 235. After Westport obtained new counsel, it moved for and was denied partial summary judgment on the validity of the shareholders' agreement. It was only after a third motion to compel arbitration was brought and denied that it filed its notice of appeal from the denial of arbitration. This occurred on September 1, 2006, well past the 30-day time period following the November 10, 2005 order denying arbitration. CP 506. Although Westport focuses on the language, "at this stage of the litigation," from the trial court's order, there is no mistake that the trial court denied Westport's motion to compel arbitration on November 10, 2005.[1] It is the trial court's refusal to grant this relief which triggers the duty to appeal.

In addition to forfeiting the right of appeal by waiting over 30 days from the November 10, 2005 order, Westport's conduct in the litigation after the entry of that order constitutes a waiver of any claimed right to arbitrate substantive issues, because those issues were ruled upon by the trial court at Westport's request. As noted above, Westport brought a

[1] The trial court was aware that arbitration may be appropriate later in the litigation, after the court's determination regarding the enforceability and validity of the shareholders' agreement and the facts regarding the underlying discrimination and other claims were decided by the trier of fact. This is precisely why the language "at this stage of the litigation" was used. VRP (Jan. 3, 2006) 8:14-9:20.

motion for partial summary judgment on the very issue it claims is subject to arbitration, the enforceability of the agreement. CP 235.

There are typically three factors used to determine whether a party has waived a right to compel arbitration: (1) the party's knowledge of the right to arbitration; (2) the existence of acts inconsistent with the right to arbitration; and (3) prejudice to the opposing party. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 362, 103 P.3d 773 (2004). When a party knows of its claimed right to arbitration and then requests and receives a substantive ruling on the issue the party claims is subject to arbitration, these three factors are all satisfied. *Naches Valley School District,* 54 Wn. App. 388, 395-96, 775 P.2d 960 (1989). In *Naches Valley School District*, several retired teachers sought compensation for accrued sick leave. Because the teachers moved for summary judgment on the merits of the claim, the reviewing court would not allow the teachers to have the dispute resolved through arbitration. There, the court held that by moving for summary judgment, the teachers waived arbitration, reasoning as follows:

> Although we have decided the matter at issue is subject to arbitration, we conclude that Cruzen, Hinze, and Smith waived arbitration with respect to their individual claims. . . . Specifically, the three teachers moved for summary judgment on the issue of the District's liability after the Association had already moved for summary judgment on the arbitration issue. The teachers' motion indicates an intent by them to proceed with the action rather than seek arbitration.

Id. at 395-96 (emphasis added). *See also*, *Steele*, 85 Wn. App. at 859 ("Prejudice can be substantive, such as when a party loses a motion on the merits and then attempts, in effect, to relitigate the issue by invoking arbitration[.]"); *Kinsey v. Bradley,* 53 Wn. App. 167, 171-72, 765 P.2d 1329 (1989) (ruling waiver present because party engaged in extensive motion practice to dismiss claims without seeking arbitration); *Lake Washington School Dist. v. Mobile Modules,* 28 Wn. App. 59, 61, 621 P.2d 791 (1980) (holding "[t]he public policy in favor of arbitration supports the rule that arbitration should be pursued before either party is entitled to judicial relief."); *Applicolor, Inc. v. Surface Combustion, Corp.*, 77 Ill. App. 2d 260, 267, 222 N.E.2d 168 (Ill. App. 1966) (ruling party waived right to arbitration by filing motion for summary judgment).

Westport argues that it only acted to protect itself while the case was pending before the trial court. However, the way to protect itself was to immediately appeal the ruling on arbitration. Further, the Utah Supreme Court recently rejected such an argument in *Baker v. Stevens*, 114 P.3d 580, 584 (Utah 2005). There, the plaintiff brought suit against her husband's doctor for malpractice. *Id.* at 581. The doctor moved to compel arbitration and immediately appealed when the trial court refused to grant the relief requested. *Id.* While the case was on appeal, the doctor moved for summary judgment. *Id.* Under these facts, the Utah Supreme Court held the doctor waived arbitration as a mater of law, reasoning:

> Given this undisputed fact, we think it evident that Dr. Rosenthal waived his right to arbitrate. By seeking summary judgment from the district court, Dr. Rosenthal litigated the very issues he originally sought to arbitrate. In short, he proceeded as if he had not even appealed the district court's denial of his motion to compel arbitration. Dr. Rosenthal would have no reason to seek summary judgment unless he intended it to dispose of Christine's claim against him. We have no doubt that filing a motion for summary judgment, as Dr. Rosenthal did, qualifies as substantial participation "in the underlying litigation to a point inconsistent with the intent to arbitrate," . . . and that Dr. Rosenthal clearly intended "'to submit to the jurisdiction of the court and pursue redress through litigation,'" . . .

Id. at 584 (footnote and internal citations omitted) (emphasis added).

By filing a motion for partial summary judgment on the claim it asserts is subject to arbitration, Westport indicated its intent to proceed in a judicial forum and waived its right to seek arbitration on the enforceability of the shareholders' agreement. To rule otherwise would permit a party to first take a shot with the court, and then, if dissatisfied with the court's ruling, take a second shot at the same issue in arbitration. Westport advanced it's claimed right to arbitration, but nevertheless, refused to appeal the denial of arbitration. Instead, it filed a dispositive motion on the merits of the very same issue, and now wants this Court to give permission to relitigate this same question in arbitration, all to the obvious prejudice of Mr. Nelson. Through these actions, Westport waived arbitration on the enforceability of the agreement.

C. None Of Mr. Nelson's Claims Are Subject To Arbitration.

Arbitration is a contractual remedy, freely bargained for, that provides extrajudicial means for resolving disputes. *Thorgaard Plumbing & Heating Co. v. County of King,* 71 Wn.2d 126, 131, 426 P.2d 828 (1967). The "first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Kamaya v. American Property Consultants,* 91 Wn. App. 703, 712, 959 P.2d 1140 (1998); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The scope or arbitrability of a dispute is controlled by the language of the contract and is determined by the court.

Under both state and federal case law, when determining whether the parties have agreed to arbitrate a particular issue, the court must apply ordinary state-law principles that govern the formation and validity of contracts. *First Options of Chicago Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). Where the parties dispute whether an arbitration clause applies to a particular controversy, the question is for the court. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83 (2002). In *Howsam*, the court held:

> This Court has determined that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); see also *First Options*, 514 U.S. at 942-943. Although the Court has also long recognized and enforced a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927

> (1983), it has made clear that there is an exception to this policy: The question whether the parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability," is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."

Id.

Decisions issued after *Buckeye* affirm that this black letter law remains. *Duthie v. Matria Healthcare, Inc.*, 535 F. Supp. 2d 909, 915 (N.D. Ill. 2008) ("The Supreme Court has left no doubt that whether the parties have submitted a particular dispute to arbitration ((i.e., the question of arbitrability)) is an issue for judicial determination . . . ."); *Bruni v. Didion*, 160 Cal. App. 4th 1272, 1286 (Cal. App. 4th Dist. 2008) (accord).

In Mr. Nelson's case, the trial court determined that the agreement did not provide the arbitrator with authority to determine its enforceability. CP 498. Judge McCauley specifically held that "the arbitration clause is narrow, and the parties did not agree to arbitrate the validity of the Shareholders Agreement." *Id.* Westport focuses on the question of whether there is an "irresolvable" difference between Mr. Nelson and the other shareholders; however, Westport's focus is misplaced. If the shareholders' agreement is unenforceable, as Mr. Nelson contends, then the question of irresolvable differences is irrelevant.[2] Because the trial

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[2] When Westport first demanded the sale of its shares under the 2004 Shareholders' Agreement on June 17, 2005, the claimed basis was that Mr. Nelson's employment was terminated. CP 7, 42. After this lawsuit was filed and Westport realized that Mr. Nelson was challenging the triggering of the buy-back provision in that his termination was unlawful, Westport added the irresolvable differences basis for triggering the buy-back provision. CP 409. At the Court of Appeals, Westport asserted that once Mr. Nelson brought suit there was an "irresolvable difference." Enforcing one's rights under anti-

court's determination that the arbitration clause is narrow was correct, this Court should affirm.

D. The Lower Courts All Properly Applied *Buckeye.*

Both the trial court and the Court of Appeals correctly determined that *Buckeye* was not controlling because the contract in *Buckeye* expressly provided that the arbitrator would determine issues of the contract's enforceability and scope. Here, however, the arbitration language in the 2004 Shareholders' Agreement is extremely narrow and does not provide the arbitrator with this authority. Unlike this case, the *Buckeye* case, a class action, involved a very broad, all-disputes arbitration clause. There, the arbitration clause provided, in relevant part:

> 1. *Arbitration Disclosure.* By signing this Agreement, you agree that if a dispute of any kind arises out of this Agreement or your application therefore or any instrument relating thereto, then either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 2 below . . . .
>
> 2. *Arbitration Provisions.* Any claim, dispute, or controversy . . . arising from or relating to this Agreement . . . or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively 'Claim'), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration . . . . This arbitration Agreement is made pursuant to

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discrimination laws should never be considered an "irresolvable difference" for purposes of divesting an individual of his interests in a valuable corporation. Moreover, Westport has not proven that in fact the differences are truly irresolvable considering there is now a forum for resolving these differences. Although the issue of "irresolvable differences" is not relevant if the 2004 Shareholders' Agreement is determined to be unenforceable, to the extent this Court relies on Westport's claim that an "irresolvable difference" is present, this Court should consider that this claim was based on Mr. Nelson's efforts to vindicate his statutory and common law rights violated by Westport.

> a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ('FAA'), 9 U.S.C. Sections 1-16. The arbitrator shall apply applicable substantive law constraint *[sic]* with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized by law . . . .

Buckeye, 546 U.S. at 442-443 (emphasis added in underline).

This contract language in *Buckeye* is significantly broader and different than the arbitration clause here. The *Buckeye* agreement specifically required that the arbitrator decide questions about the "scope," "validity" and "enforceability" of the agreement.

At the trial court level, Judge McCauley correctly distinguished *Buckeye* when he ruled:

> The recent case of *Buckeye Check Cashing Inc. v. Cardegna*, ___ U.S. ___, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) did not change the law in a way that would affect my prior rulings on arbitration. The *Buckeye* Court relied on prior case law containing broad arbitration clauses. Similarly, the *Buckeye* Court interpreted a broad arbitration clause. In the present case, I ruled that the arbitration clause is narrow, and the parties did not agree to arbitrate the validity of the Shareholders Agreement.

CP 498. The Court of Appeals affirmed on the same grounds as the trial court. In relevant part, the Court of Appeals held as follows:

> Unlike the arbitration provision in *Buckeye*, the 2004 shareholders agreement arbitration clause does not expressly encompass disputes about the validity, enforceability, or scope of the arbitration clause in particular. In our view, this distinction is critical to our holding that *Buckeye* does not apply here.

Nelson, 140 Wn. App. at 114.

Because *Buckeye* is factually distinct in this critical aspect, the courts below each correctly applied the Supreme Court's jurisprudence.

E. Mr. Nelson's Employment and Shareholder Claims Are Not Subject to Arbitration.

The trial court and Court of Appeals also correctly determined that Mr. Nelson's minority shareholder claims and employment claims are not subject to arbitration. The shareholders' agreement does not reference, discuss, or relate to Mr. Nelson's employment or the duties owed to Mr. Nelson as a minority shareholder. CP 45-46. The law is clear that one is not obligated to arbitrate disputes that are not part of the express contract. Because the employment and minority shareholder claims, which arise under statutory and common law, are not covered by this arbitration clause, they are not subject to arbitration, even if the shareholders' agreement is held enforceable. These claims, and the facts underlying these claims, must be decided first by the trier of fact in the judicial proceedings, not by an arbitrator. *See Davis v. Chevy Chase Financial*, 667 F.2d 160, 166 (D.C. Cir. 1981).

V. CONCLUSION

For the reasons stated above, Respondents respectfully request that this Court remand this matter for trial.

Dated this 22nd day of July, 2008.

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & DAHEIM LLP

By _____
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CERTIFICATE OF SERVICE

I, Becky J. Niesen, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

A. I am a United States Citizen, over the age of 18 years, not a party to this cause, and competent to testify to the matters set forth herein.

B. I am employed by the law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98401, attorneys for plaintiff/appellant.

C. On July 22, 2008, I caused a copy of the Supplemental Brief of Respondents to be served upon the following:

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Becky J. Niesen

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